

April 8, 1993

MEMORANDUM

TO: Don Hamera, ENSV
FROM: David Hoefer, CNSL
RE: Maline Creek

The following responds to your voice mail of last week.

Pursuant to Section 101(14) of CERCLA the term "hazardous substance" includes "any element, compound, mixture, solution, or substance designated pursuant to section 102" of CERCLA. Section 102 of CERCLA provides in part that "[t]he Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances . . . such elements compounds, mixtures, solutions, and substances which when released into the environment may present substantial danger to the public health or welfare or the environment." Such regulations appear in 40 C.F.R. Part 302.

"Hazardous substance" is defined in 40 C.F.R. § 302.3 as "any substance designated pursuant to 40 C.F.R. Part 302." In Table 302.4 which appears in Part 302 you will find that asbestos is listed as a hazardous substance. What has apparently caused some confusion is the notation that appears following the table which states that "[t]he RQ for asbestos is limited to friable forms only." This notation has no effect on asbestos being a hazardous substance under CERCLA. All this reference means is that for release reporting purposes (per Section 103 of CERCLA), the statutory default RQ of one pound, as set forth in CERCLA § 102(b), applies, and that such release must be of friable asbestos. So if one pound of nonfriable asbestos is released, no reporting is required. Again, this does not affect asbestos being a CERCLA hazardous substance, all this pertains to is quantity of release for reporting purposes.

To complicate things further, asbestos is a toxic pollutant as set forth in Section 307(a)(1) of the Clean Water Act, 33 U.S.C. § 1317(a)(1), and listed in 40 C.F.R. § 401.15, and therefor meets the definition of hazardous substance in Section 101(14)(D) of CERCLA. Asbestos is also listed as a hazardous air pollutant as set forth in Section 112(b)(1) of the Clean Air Act, 42 U.S.C. § 7412(b)(1), and listed in 40 C.F.R. § 61.01, and therefor meets the definition of hazardous substance in Section 101(14)(E) of CERCLA.



Regardless of the fact that asbestos is a CERCLA hazardous substance by virtue of it being designated under the Clean Water Act and the Clean Air Act, I want to emphasize that asbestos is a listed hazardous substance under CERCLA, so reference to other statutes is unnecessary.

As to whether we have jurisdiction to perform a cleanup under CERCLA when the source of the asbestos is a building, things get even more complicated. A cleanup such is contemplated here would be conducted pursuant to Section 104(a) of CERCLA. Under Section 104(a) we need to show that a hazardous substance has been released or that there is a substantial threat of such a release into the environment. If the release is contained entirely within a building it is not a release into the environment for Section 104 purposes, and therefor we lack jurisdiction. However, we may have jurisdiction if we can establish that the situation poses a substantial threat of a release into the environment, but we will also have to grapple with the problems posed by the so-called "asbestos exclusion" which is found in Section 104(a)(3)(B) of CERCLA.

The "asbestos exclusion" limits our authority to respond to a release or threat of a release from products which are part of the structure of, and result in exposure within, buildings. However, a response action may be taken if: (1) the hazardous substance is being released into the environment or there is a threat that it will be released into the environment; and (2) such release or threatened release constitutes a "public health or environmental emergency;" and (3) no other person with the authority or capability to respond to the emergency will do so in a timely manner. Headquarters concurrence on such an action would be necessary as it would be considered to be of national significance. (See Response Actions at Sites with Contamination Inside Buildings, OERR Directive 9360.3-12).

As to Maline Creek it appears that we have a release or threatened release of asbestos into the environment, however it remains to be seen as to whether such release or threatened release constitutes a public health or environmental emergency. Also, until such time as we discuss a cleanup with the PRPs I don't know that we can make a determination that there is no other person with the authority and capability to respond to the emergency in a timely manner. I intend to contact someone in HQ regarding this as soon as I find out who that person may be.